Editor's note: 79 I.D. 155

UNITED STATES
v.
MELVIN McCORMICK

IBLA 70-534 Decided April 28, 1972

Appeal from the Bureau of Land Management land office decision A-4497 declaring mining claims null and void.

Affirmed.

Mining Claims: Contests--Rules of Practice: Government Contests

Under the Department rules governing government contests against mining claims, a contestee is required to answer within 30 days after he is served with a copy of the contest complaint, and where he fails timely to file an answer to the allegations of the complaint, they will be taken as admitted and the mining claim which is subject of the contest is properly declared null and void without a hearing where one of the charges in the complaint alleges no discovery of a valuable mineral deposit.

Mining Claims: Generally

Section 2322, Revised Statutes, 30 U.S.C. § 26 (1970), does not by its terms grant any right to the wife of the locator or a subsequent claimant either present or contingent in an unpatented mining claim.

Rules of Practice: Government Contests--Words and Phrases

"Community Property." With respect to unpatented mining claims in states recognizing community property laws, the husband represents the community interest of himself and also his wife, and as to such interest the wife is considered to be in privity with her husband, and where a government contest is brought against such an unpatented mining claim with only the husband named in the notice of contest and complaint, the wife is represented in said cause as though she had been expressly made a party thereto.

APPEARANCES: William N. Hackenbracht, for the appellant; Richard L. Fowler, attorney in charge, Office of the General Counsel, U.S. Department of Agriculture, for the government.

OPINION BY MR. HENRIQUES

This is an appeal from the decision of the Arizona land office, Bureau of Land Management, dated March 9, 1970, declaring the Too High placer mining claim and the Up in the Sky placer mining claim null and void for the reason that the contestee failed timely to file an answer after he properly had been served with a copy of a contest complaint.

The record recites the Too High placer mining claim was located on October 29, 1953, by Melvin McCormick and N. B. Forehand on land within the Coconino National Forest, Coconino County, Arizona. The Up in the Sky placer mining claim was located on the same day on contiguous land by Melvin McCormick only. Both claims are properly recorded in Coconino County, Arizona. N. B. Forehand died on January 20, 1960, and his wife, Roberta Forehand, was declared to be his legal heir by the Superior Court of Coconino County. Mrs. Forehand deeded her interest in the Too High claim to Melvin McCormick on November 20, 1965, by quitclaim deed which was duly recorded in Coconino County on January 7, 1966. The State Director, Bureau of Land Management, initiated a contest at the request of the Forest Service, United States Department of Agriculture, naming Melvin McCormick as contestee and charging among other things that a valid discovery, as required by the mining laws of the United

States, does not exist within the limits of the Too High and the Up in the Sky placer mining claims. Service was effected on Melvin McCormick by certified mail, which was received and signed for by him on January 20, 1970. The notice carried a specific caveat that unless the contestee filed an answer to the allegations within 30 days after service of the notice and complaint, the allegations of the complaint would be taken as admitted and the case decided without a hearing as provided by regulation. McCormick filed an answer, through counsel, on February 24, 1970, more than 30 days after service of the notice and complaint. On March 9, the land office issued its decision declaring the subject mining claims null and void and the contest closed. McCormick then appealed to this Board.

In essence McCormick contends that the mining claims in question were community property and as such his wife owned a half interest in the same and so was entitled to be named as a party contestee in the complaint; that failure to name Hilde McCormick, his wife, rendered the complaint subject to summary dismissal, citing among other things, the Department regulations relating to contests 43 CFR Subpart 1852 (now 43 CFR Subpart 450 (1972)).

The location of a mining claim is an appropriation of federal land for private use, so it must conform to the dictates of federal

law. In Black v. Elkhorn Mining Company, 163 U.S. 445 (1896), the Supreme Court stated, after reciting the rights given to locators under Section 2322 [Revised Statutes] (30 U.S.C. § 26 (1970)):

> [i]t [Sec. 2322] does not by its terms grant any right to the wife of the locator either present or contingent.

Id. at 448. See also Bradford v. Morrison, 212 U.S. 389 (1909), an appeal from the Supreme Court of Arizona.

Although a woman, as a citizen of the United States, may, in propria persona, locate mining claims pursuant to R.S. 2319, 30 U.S.C. § 22 (1970), unless she is specifically named in the notice of location or in a subsequent deed transferring title to an unpatented mining claim, the wife of the locator or claimant to an unpatented mining claim need not be recognized by the United States as having any rights in or to an unpatented mining claim or being entitled to notice and an opportunity to be heard under due process in any proceeding against such unpatented mining claims owned in whole or in part by her husband. Black v. Elkhorn Mining Company, supra.

Further, we find no basis for reversing the decision of the land office since the courts in states recognizing community property, have consistently held, with respect to such community property, that the husband represents the community interests of

himself and also his wife, and as to such interest the wife is considered to be in privity with her husband and is represented in actions affecting such community property as though she had been expressly made a party thereto. See Lichty et ux. v. Lewis et ux., 77 F. 111 (9th Cir. 1896); Cutting v. Bryan et al., 274 P. 326 (Sup. Ct. Calif. 1923). The husband is the head of the community and invested by statute with the power to manage and dispose of the community assets. Barcon v. School District No. 40, Miami Area Schools, Miami, Arizona et al., 441 P.2d 540 (Sup. Ct. Ariz. 1968); Pendleton v. Brown, 221 P. 213 (Sup. Ct. Ariz. 1923). Cf. King v. Uhlmann, 437 P.2d 928 (Sup. Ct. Ariz. 1968). 1/

A review of the facts in this case clearly shows that no rights of Hilde McCormick have been prejudiced in any way by failure of the Bureau of Land Management to name her as a party to the complaint against the Too High and the Up in the Sky placer mining claims.

Appellant has requested permission to present oral argument in this matter. The evidence of record affords a sufficient basis

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1/ 11 Ariz. Rev. Stats. Anno. § 33-452 provides:

"A conveyance or incumbrance of community property is not valid unless executed and acknowledged by both husband and wife, except unpatented mining claims which may be conveyed or incumbered by the spouse having the title or right of possession without the other spouse joining in the conveyance or incumbrance."

upon which to rest our conclusion. Oral argument would serve no useful purpose. Accordingly, the motion is denied.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior (211 DM 13.5; 35 F.R. 12081), the decision below is affirmed.

Douglas E. Henriques, Member

We concur:

Edward W. Stuebing, Member

Anne Poindexter Lewis, Member